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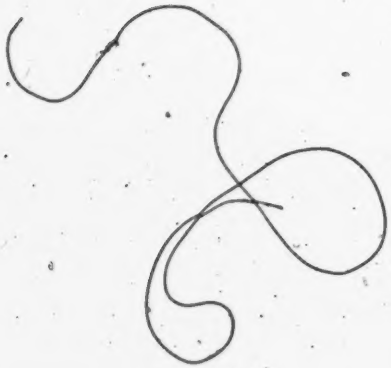

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1202, March

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FILED
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MOORE-MCCORMACK LINES, INC.,

Petitioner,

v.

CARMELO CANDIANO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
The Questions Presented	2
Statement of Facts	2
Reasons Why Petition Should Be Denied	4
Conclusion	10

TABLE OF CASES CITED

Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962)	9
Blassingill v. Waterman Steamship Corp., 336 F. 2d 367 (9 Cir. 1964)	7
Crumady v. The J. H. Fisser, 358 U. S. 423 79 S. Ct. 445	5, 6
Ferrante v. Swedish American Line, 331 F. 2d 571 (3 Cir. 1964)	7
Grillea v. U. S., 232 F. 2d 919 (2 Cir. 1956)	7
Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 83 S. Ct. 206, 83 S. Ct. 1185	7
Knox v. U. S. Lines Co., 320 F. 2d 247 (3 Cir. 1963)	7
Mahnich v. Southern Steamship Co., 321 U. S. 96 (1944), 64 S. Ct. 455	5
Manhat v. U. S., 220 F. 2d 143 (2 Cir. 1955), cert. denied 349 U. S. 966	8

PAGE

Mascuilli v. U. S., 387 U. S. 237 5

Massa v. C. A. Venezuelan Navigacion, 332 F. 2d 779 (2 Cir. 1964), cert. denied 379 U. S. 914 .. 10

Norfleet v. Isthmian Lines, 355 F. 2d 359 (2 Cir. 1966) 7

Puddu v. Royal Netherlands S.S. Co., 303 F. 2d 752 (2 Cir. 1962), cert. denied 371 U. S. 840 10

Radovich v. Cunard S.S. Co., 364 F. 2d 149 (2 Cir. 1966) 7

Reid v. Quebec Paper Sales & Transportation Co., 340 F. 2d 34 (2 Cir. 1965) 7

Scott v. Isbrandtsen Co., 327 F. 2d 113 (4 Cir. 1964) 7

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872 ..... 5, 7

Skibinski v. Waterman S.S. Corp., 360 F. 2d 539 (2 Cir. 1966), cert. denied 387 U. S. 921 (1967) ..4, 6, 8

Spinelli v. Isthmian S.S. Co. (2 Cir. 1964), 326 F. 2d 870 8

Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2 Cir. 1950), cert. denied 341 U. S. 904 ..6, 7, 10

Thompson v. Calmar S.S. Corp., 331 F. 2d 657 (3 Cir. 1964), cert. denied 379 U. S. 913 .....6, 7, 10

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Opinions Below

The opinion of the District Court is reported in 1967 AMC 635. The opinion of the Court of Appeals for the Second Circuit is reported at 382 F. 2d 961. The opinion of the Court of Appeals for the Second Circuit denying rehearing is reported at 1967 AMC 2315.

Jurisdiction

It is not disputed that there is jurisdiction under Title 23, U.S.C., Section 1254(1).

The Questions Presented

1. Is the use of patently unsuitable equipment which creates a dangerous condition that pre-exists an injury by an appreciable period of time within the ambit of the warranty of seaworthiness?

2. Can the unseaworthiness of a vessel be set in motion by the acts of co-workers?

3. Can a shipowner absolve himself of his obligation under the warranty of seaworthiness to provide and maintain a safe place to work by having the traditional work of seamen performed by longshoremen?

4. Have not the courts below by their findings:

   (a) That an appreciable period of time elapsed from the time pontoon hooks were inserted in the beam to the time the accident occurred;

   (b) That apparatus used was unsafe, unfit, and unsuitable for the use to which it was put; and

   (c) That the petitioner's (defendant below) vessel was unseaworthy;

disposed of petitioner's so-called theory of "operational negligence" and the defense of a "continuing operation"?

5. Can petitioner absolve itself of liability because proper equipment—a toggle bridle was on board and available?

Statement of Facts

The following findings of the District Court (per Feinberg, J.) have been omitted from petitioner's statement of the case.

"The basis of plaintiff's claim is that the ship was unseaworthy because the device used to lower the hatch beam was not reasonably fit for its intended use. All parties agree that the longshoremen used a pontoon bridle to secure the beam to the cargo falls."

* * *

"Plaintiff claims that a different type of bridle—a toggle beam bridle—was the proper appliance for lowering a steel hatch beam."

* * *

"Accordingly, plaintiff argues that an improper and unsafe appliance was used; thereby rendering the ship unseaworthy. Shipowner claims that the pontoon bridle was reasonably fit for its intended purpose and, in any event, toggle bridles were supplied by the ship and made available to Stevedore."

* * *

"There is little doubt that the lowering mechanism utilizing the pontoon bridle as it was actually used by the longshoremen was unsafe, and, therefore, unfit." (Appendix, Petitioner's Brief, p. 2a)

and further:

"I find that an unseaworthy condition had already come into being at the time the hatch beam fell and this condition caused the injury to plaintiff. There was an appreciable period of time after the hatch beam was secured to the cargo falls and before the beam fell off as it was being lowered. Once the beam was attached to the pontoon bridle albeit insecurely, as later became clear—the lowering mechanism was clearly unsafe and, therefore, unseaworthy." (Appendix, Petitioner's Brief, p. 5a)

and further:

> "Under the circumstances, then, the fact that a toggle bridle was available to the longshoremen does not require a finding that the ship was seaworthy." (Appendix, Petitioner's Brief, p. 8a)

Reasons Why Petition Should Be Denied

THE DECISIONS OF THE COURTS BELOW, FINDING THE VESSEL OF PETITIONER UNSEAWORTHY, REPRESENT A PROPER APPLICATION OF THE LAW TO THE FACTS PRESENTED.

Based on the Trial Court's determination of questions of fact, particularly that an "appreciable" length of time had elapsed from the time pontoon hooks were inserted in the beam to the time of the occurrence of the accident and that the vessel in question was unseaworthy at the time of the occurrence of the accident in question (which determination has been adopted by petitioner), and based on the prior applicable determinations of the courts, a finding in favor of plaintiff was proper and should not be disturbed.

At the very outset, the Court's attention is called to the fact that petitioner has adopted the lower court's findings of fact, i.e., that an "appreciable" length of time transpired from the time the pontoon hooks were attached to the beam which subsequently fell on respondent (plaintiff below) that the lowering mechanism "was unsafe and, therefore, unfit", and "that an unseaworthy condition had already come into being at the time the hatch beam fell and this condition caused the injury to plaintiff."

The very same questions now presented by petitioner were adversely passed upon in the case of *Skibinski* v. *Waterman S. S. Corp.*, 1966, AMC 873, 360 F. 2d 539 (1966), cert. denied 387 U. S. 921 (1967).

If, *arguendo,* we for the moment disregard the implications of this court's determination in *Mascuilli* v. *U. S.,* 87 Supreme Ct. 1705 (May 22, 1967), 387 U. S. 237, the petition should be denied on the basis of law applicable at the time of trial.

The court's attention is respectfully called to the opinion of the Court of Appeals (2nd Circ.) denying petitioner's application for rehearing, where the court in part said:

> "Were Candiano to be resubmitted today, these intervening cases would only strengthen the conclusion that the negligent hook-up followed by an 'appreciable period of time' (as found by the trial court) would create an unseaworthy condition. * * *" (Petitioner's Appendix, pp. 34a-35a)

Petitioner apparently is seeking to have this court summarily reverse or disregard the firmly established holdings, granting substantial rights to longshoremen, since the determination in *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U. S. 85, 66 S. Ct. 872, and the host of subsequent determinations requiring a vessel owner to furnish a seaworthy vessel and fit and proper apparatus, and to further disregard the principles heretofore evolved relating to the liability of a vessel owner without fault. The per curiam opinion of this court in *Mascuilli* v. *U. S.,* above cited, clearly indicates that principles heretofore evolved still control. That this is the feeling of this court is indicated by the citation of the leading cases of *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 1944 AMC C. 1 (1944), and *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, in such opinion.

Certainly, it is apparent that the questions now presented to the court by petitioner have heretofore been fully passed upon and determined adversely to the propositions advanced by the petitioner and do not present any new or novel issues.

The case of *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 64 S. Ct. 455, clearly established the law that unseaworthiness of a vessel is not excused because the acts of a fellow servant bring it into play, and further, that the availability of proper and sound equipment on board does not absolve a vessel owner because unseaworthy equipment was used.

The decision in the case of *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, clearly supports respondent's contention. The court's attention is respectfully called to the following excerpt from Judge Learned Hand's opinion (at p. 556):

> "* * * but other bridles were available which could have been used, and which had a single ring with four lengths of wire. These concededly would have been suitable, and the defendant asserts that their presence made the ship seaworthy, even if they were not used. In answer we need only cite Mahnich v. Southern SS Co. (321 U. S. 96 (1944))."

It has been established beyond per-adventure of doubt, that "improper use of otherwise sound equipment may give rise to a condition of unseaworthiness;" "Unseaworthiness is not excused on the ground that it was caused by the acts of fellow servants; nor is it excused because proper equipment was available but not used" (*Skibinski* v. *Waterman Steamship Corporation*, 360 F. 2d 539).

Crumady v. *The J. H. Fisser*, 358 U. S. 423, 79 S. Ct. 455;

Thompson v. *Calmar*, 3d Cir., 1964, 331 F. 2d 657, cert. denied 1964, 379 U. S. 913;

Strika v. *Netherlands Ministry of Traffic* (2d Cir., 1950), 185 F. 2d 555, cert. denied 1951, 341 U. S. 904.

The holding that gear which is neither defective nor broken can, if put to an improper use, render a vessel unseaworthy was reaffirmed by this court by its citing with approval *Strika* v. *Netherlands Ministry of Traffic, supra,* in *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206, 214, 83 S. Ct. 1185, 1190.

Petitioner's restrictive interpretation of broad, policy-based decisions of this court fails to take into account the increasing spectrum of the warranty of seaworthiness since *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 S. Ct. 872, was decided in 1946.

Decisions in the Circuit Courts are in accord in recognizing the broad coverage of the warranty of seaworthiness.

Thompson v. *Calmar Steamship Corp., supra;*
Ferrante v. *Swedish American Lines,* 331 F. 2d 571 (3d Cir.), cert. dismissed 1964;
Knox v. *U. S.,* 320 F. 2d 247 (3d Cir. 1963);
Scott v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964);
Blassingill v. *Waterman S.S. Corp.,* 336 F. 2d 367 (9th Cir. 1964);
Radovich v. *Cunard S.S. Co. Ltd.,* 2d Cir. decided July 18, 1966, Docket No. 29867; 364 F. 2d 149;
Reid v. *Quebec Paper Co., Ltd.,* 340 F. 2d 34 (2d Cir. 1965);
Norfleet v. *Isthmian Lines, Inc.,* 355 F. 2d 359 (2d Cir. 1966);
Grillea v. *United States,* 232 F. 2d 919 (2d Cir. 1956);
Strika v. *Netherlands Ministry of Traffic, supra.*

While the undersigned is well aware of the decisions cited by petitioner denying a recovery to longshoremen because of "operational negligence", it is respectfully submitted that the determinations in such cases were based on facts and situations clearly distinguishable from the

case at bar. The basis for distinction is succinctly set forth in the opinion of the Trial Court (Southern District of N. Y.) in *Skibinski* v. *Waterman Steamship Corporation* (above cited), where, the Circuit Court, in its opinion, held in part as follows:

> "Massa v. C. A. Venezuelan Navigacion, 332 F. 2d 779 (2d Cir. 1964), Spinelli v. Isthmian Co., 326 F. 2d 870 (2d Cir.), cert. denied, 377 U. S. 935 (1964) and Puddu v. Royal Netherlands S.S. Co., 303 F. 2d 752 (2d Cir.), cert. denied, 371 U. S. 840 (1962) are all distinguishable since they were thought to involve transitory situations which had not yet ripened into seaworthiness. Each arose 'as a momentary step or phase in the progress of work on board' and was 'considered as an incident in a continuous course of operation.' Grillea v. United States, supra at 922.
>
> On the basis of the evidence before it, the trial court was justified in holding that Skibinski's injury resulted from the unseaworthiness of the ship."

The case of *Manhat* v. *U. S. A., etc.,* 220 F. 2d 143, cert. denied 349 U. S. 966, is clearly distinguishable from the case at bar. The cited case dealt with a situation where the libellant was injured when a lifeboat in which he was working, fell. Contrary to instructions, a fellow employee released a lever in the boat. The improper and prohibited movement of the lever immediately resulted in the accident complained of and "nothing about the apparatus itself justified an inference of unseaworthiness."

Certainly, when improper equipment is used or in any event, when gear is used in an improper manner creating a dangerous condition, and when such dangerous condition existed for such an appreciable period of time as to render the vessel unseaworthy as the trial court found, the vessel owner must respond in damages.

In an attempt to bolster his claim that the facts present in the case at bar indicate a "continuous act", petitioner

has cited a number of cases in his memorandum dealing with acts of fellow workers and longshoremen which have instantaneously resulted in injury to plaintiffs. An examination of such cases at once discloses that the fact situations present are not analogous to the case at bar. The findings of fact contained in the opinion of the trial court clearly indicate contrariwise. Petitioner has accepted the findings of fact of the lower court so that under no circumstances should the determination of the lower court of the factual situation be disturbed.

There is a practical unanimity of opinion by the Appellate Courts that unseaworthiness arises when the "negligent act terminated" and the "unsafe condition continued to exist" (as use of unfit and improper equipment or equipment improperly utilized as found by the trial court in the case at bar).

It is quite apparent that petitioner agrees with this concept when we refer to his brief (p. 19) citing the case of *Billeci* v. *U. S.*, 9th Cir. 1962, 298 F. 2d 703:

> "* * * but the winch was in continuous use. The court in finding against the plaintiff, drew a clearly distinguishable line of demarcation between a situation in which a negligent operation had terminated (leaving the residue of a negligently created dangerous condition) and a situation where the operation causing danger was still going on."

Definitely, the Trial Court below followed this distinction in determining the factual situation in favor of respondent.

Petitioner claims there are important and unsettled questions of law presented which require a determination by this tribunal. It is submitted that there have been numerous other requests for certiorari by both longshoremen and shipowners (which have been dealt with by this court), where a longshoreman was injured as a result of improper

use of equipment, use of improper and unfit equipment when proper equipment was available and the question where a negligent act terminates and unseaworthiness begins. This court, however, has left to the trier of the facts the question of when a particular set of circumstances results in a vessel being rendered unseaworthy.

Thompson v. *Calmar, supra;*
Massa v. *C. A. Venezuelan Navigacion,* 332 F. 2d 779, 2d Cir. 1964, cert. denied 379 U. S. 914;
Puddu v. *Royal Netherlands Steamship Company,* 303 F. 2d 752, 2d Cir. 1962, cert. denied 371 U. S. 840;
Strika v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, 2d Cir. 1950, cert. denied 341 U. S. 904.

CONCLUSION

Upon the foregoing considerations the petition for writ of certiorari should be denied.

Respectfully submitted,

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